Supreme Court, U.S.
FILED

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PETITION NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER 1993 TERM

JAMES R. WARDELL,

PETITIONER,

V.

MARK M. TRACY,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE

COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

James R. Wardell, Petitioner
870 Quince Orchard Blvd., #202
Gaithersburg, MD 20878
(301) 963-8279

86 pp

I. Questions Presented for Review

1. Whether the Equal Protection Clause of the Fourteenth Amendment prohibits arbitrary discrimination by a state court in imposing an award of attorney's fees pursuant to rule of court and the common-law policy of the state.

2. Whether sham appellate review demonstrates discriminatory purpose.

3. Whether the courts of the State of Maryland denied Petitioner's Fourteenth Amendment right to the equal protection of the laws, through imposition of an award of attorney's fees for maintaining a proceeding to rescind a protective order entered without prejudice, and sham appellate review.

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V. Statement of the Grounds on Which the Jurisdiction of this Court is Invoked

Petitioner requests review by this Court on Writ of Certiorari to the Court of Special Appeals of Maryland, of an Order of December 11, 1992 (page 29 hereinafter) of the Circuit Court for Montgomery County, Maryland and of the Maryland appellate review thereof (Opinion, page 56 hereinafter), awarding Respondent's attorney's fees incurred in opposing Petitioner's Motion to Rescind Protective Order, on the grounds that the Maryland courts in this case have decided the question of whether the award of attorney's fees is violative of the Fourteenth Amendment in a way that conflicts with applicable decisions of this Court, pursuant to the provisions of 28 U.S.C. § 1257 and U.S. Supreme

Court Rule 10.1(c).

VI. Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations

1. Constitution of the Unites States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 28 U.S.C. § 1257. State courts; certiorari.

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or

where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purpose of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

3. U.S. Supreme Court Rule 10. Considerations Governing Review on Writ of Certiorari.

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this

Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

4. Maryland Rule 1-341. Bad Faith--Unjustified Proceeding.

In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it.

VII. Statement of the Case

1. Diamond Farms Condominium[1] fined James R. Wardell, Petitioner, for violation of Rules and Regulations prohibiting washers and dryers, and served Petitioner with a Notice of Intent to Create a Lien for failure to pay the fine.

2. Petitioner filed a Complaint in the Circuit Court for Montgomery County, Maryland, inter alia, (1) appealing from the aforesaid fine, and (2) to determine whether probable cause exists for the establishment of a lien.

3. A relevant letter alleged to be from Mark M. Tracy, Respondent, was first introduced by Diamond Farms at a

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[1]William P. Murphy and Condominium Management, Inc. are also Defendants below; none of the Defendants are parties to the case in this Court.

Hearing in the Circuit Court, when the appeal of the fine was dismissed and probable cause for the lien was found.

4. Petitioner Noted a Deposition of the Respondent.

5. Respondent filed a Motion for Protective Order, and failed to appear for the Deposition; the Motion was subsequently granted without prejudice, Order of August 3, 1992 (page 54 hereinafter).

6. Petitioner filed a Motion to Rescind Protective Order, which was heard (transcript, page 31 hereinafter), and denied and Respondent's attorney's fees were awarded, Order of December 11, 1992 (page 29 hereinafter).

7. Petitioner filed an Appeal to the Court of Special Appeals of Maryland from the award of Respondent's attorney's fees, which was affirmed, Opinion

(page 56 hereinafter).

8. Petitioner filed a Motion for Reconsideration in the Court of Special Appeals which was denied, Order of November 3, 1993 (page 71 hereinafter).

9. Petitioner filed a Petition for Writ of Certiorari in the Court of Appeals of Maryland which was denied, Order of January 26, 1994 (page 72 hereinafter).

10. The Court of Appeals of Maryland is the highest court of the State and the state court of last resort.

11. The federal question was raised in the Circuit Court in Petitioner's Motion to Rescind Protective Order, wherein the Equal Protection Clause of the Fourteenth Amendment was quoted, and at the Hearing thereto (page 35 hereinafter) when Petitioner stated:

Also at the outset, I would

> like to say that we are, of course, governed by the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The cases I cite this morning and have cited in my Motions are governing. We believe that I am entitled to the equal protection of the laws, as set forth in the cases cited.

and was not addressed by the hearing judge (page 50 hereinafter), Order of December 11, 1992 (page 29 hereinafter).

The federal question was presented to the Court of Special Appeals[2] in Petitioner's Appellant's Brief (see pages 80-82 hereinafter) as follows:

> Question 3. Whether the award of attorney's fees is violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

and was answered by that Court as fol-

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[2]Petitioner also invoked due process and the equal protection of the laws in the Motion for Reconsideration in that Court.

lows (Opinion, pages 69-70 hereinafter):

3.

Appellant's Equal Protection claim is utterly and completely without merit. He presents us with no law or facts to support his contention that awarding attorney's fees denies him equal protection of the law.

VIII. Argument

1. This Court should grant the Petition for Writ of Certiorari.

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. Shelley v. Kraemer, 334 U.S. 1, 14, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948). State action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute. Id. at 16, 843. It has been recognized that the action of state courts in enforcing a substantive common-law rule (common-

law policy) formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment. Id. at 17, 844.

The Court of Special Appeals of Maryland in the instant case held that Petitioner's "Equal Protection claim [alleging prohibited judicial discrimination] is utterly and completely without merit," Opinion, page 69 hereinafter. See Petitioner's Appellant's Brief in that Court, pages 73-85 hereinafter.

The Equal Protection Clause prohibits arbitrary legislative classification in imposing a statutory allowance for attorney's fees. Gulf, C. & S.F. Ry. Co. v. Ellis, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666 (1897); Atchison, T. & S.F. Ry. Co. v. Vosburg, 238 U.S. 56, 35 S.Ct. 675, 59 L.Ed. 1199 (1915). However, this Court has not decided

whether the Equal Protection Clause prohibits arbitrary judicial discrimination in imposing an award of attorney's fees pursuant to rule of court and common-law policy. And, this Court has not decided whether sham[3] appellate review demonstrates discriminatory purpose. See Wayte v. United States, 470 U.S. 598, 608-610, 105 S.Ct. 1524, 1531-1532, 84 L.Ed.2d 547 (1985).

The Court of Special Appeals of Maryland in the instant case decided the federal question in a way that conflicts with applicable decisions of this Court.

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[3]Sham pleadings are those which are inherently false and must have been known by the interposing party to be untrue. Pentecostal Holiness Church, Inc. v. Mauney, Fla.App., 270 So.2d 762, 769. Black's Law Dictionary, Sixth Edition (1990) at page 1375. See also, Local 167 of International Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of America v. United States, 291 U.S. 293, 298-299, 54 S.Ct. 396, 399 (1934) (sham answers stricken).

And, these are important questions of federal law which have not been, but should be, settled by this Court.

The Petition for Writ of Certiorari should be granted, accordingly.

2. The instant case.

If a Maryland court finds that the conduct of a party in maintaining a proceeding was without substantial justification the court may award attorney's fees pursuant to Maryland Rule 1-341 (the validity of this Rule is not questioned). See transcript, page 51 hereinafter.

Applicable Maryland common-law policy includes the holdings of Dent v. Simmons, 61 Md.App. 122, 128, 485 A.2d 270, 272-273 (1985) (attempt to introduce new cause of action in tort not without substantial justification) that,

"A litigant ought not be penalized for innovation or exploration beyond existing legal horizons unless such exploration is frivolous," and Blanton v. Equitable Bank, National Association, 61 Md.App. 158, 166, 485 A.2d 694, 698 (1985) (appeal without substantial justification where order appealed was not appealable) that an action is frivolous "'when it indisputably has no merit'" (quote from Dent v. Simmons, supra, at 128, 273, n. 3). Applied, Legal Aid Bureau, Inc. v. Farmer, 74 Md.App. 707, 722, 539 A.2d 1173, 1180 (1988); accord, Newman v. Reilly, 314 Md. 364, 380-381, 550 A.2d 959, 967-968 (1988) (see Opinion, page 66 hereinafter).

In the instant case where Petitioner seeks to depose Respondent pursuant to Maryland Rules, if not otherwise justified Petitioner's Motion to Rescind

Protective Order is "exploration beyond existing legal horizons" for lack of an identical authority in Maryland case law. It is not frivolous, for lack of any opposing authority.[4] The Motion is not without substantial justification, accordingly.

Inasmuch as the instant case is thusly similar to Dent v. Simmons where there was no award of attorney's fees, and thusly dissimilar to Blanton v. Equitable Bank, National Association where there was an award of attorney's fees, the award of Respondent's attorney's

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[4]See transcript, pages 31-53 hereinafter, Opinion, pages 56-70 hereinafter. In fact, the Respondent did not cite any case-law authority whatsoever in the proceedings in this matter.

The burden of showing that the right has been abused through the prosecution of frivolous litigation should, at all times, be on the party making the suggestion of frivolity. Coppedge v. United States, 369 U.S. 438, 447-448, 82 S.Ct. 917, 922 (1962).

fees is an arbitrary discrimination[5] which denies Petitioner the equal protection of the laws. The discriminatory effect is, that of all litigants similarly situated only Petitioner must pay attorney's fees. Wayte v. United States, supra, at 608-609, 1531. Classification shall be reasonable, not arbitrary, and shall rest upon distinctions having a fair and substantial relation to the object sought to be accomplished. Atchison, T. & S.F. Ry. Co. v. Vosburg, supra, at 59, 676.

The Court of Special Appeals of

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[5]The Equal Protection Clause forbids invidious picking out of one individual to bear legal burdens not imposed upon others similarly situated. Beck v. Washington, 369 U.S. 541, 547, 82 S.Ct. 955, 969 (1962) (dissenting opinion) citing Atchison, T. & S.F. Ry. Co. v. Matthews, 174 U.S. 96, 104-105, 19 S.Ct. 609, 612-613, 43 L.Ed. 909 (1899), McFarland v. American Sugar Refining Co., 241 U.S. 79, 86, 36 S.Ct. 498, 501, 60 L.Ed. 890 (1916).

Maryland in affirming the award of Respondent's attorney's fees, Opinion, pages 56-70 hereinafter, omits relevant facts,[6] misconstrues the protective order below,[7] and otherwise expressly ig-

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[6]Opinion, pages 58-59 hereinafter (numbering from Petitioner's Motion for Reconsideration):

(ii) Respondent allegedly wrote the letter, Appellant's Brief, page 74 hereinafter;

(iii) Petitioner offered to pay Respondent's expert witness fee, transcript, page 34 hereinafter. Petitioner's Opposition to the Motion for Protective Order, filed the day before the deposition, offers to pay Respondent prior to the deposition; and

(iv) Petitioner argued that the Order of March 26, 1992 is subject to revision, Appellant's Brief, page 75 hereinafter.

[7]Opinion, page 64 hereinafter:

(v) The circuit court had previously not made findings on the merits of Respondent's Motion for Protective Order --no new showing of good cause is required, Order, page 54 hereinafter. Bailey v. Bailey, 181 Md. 385, 391, 30 A.2d 249, 252 (1943):

> So when a dismissal is not upon the merits, the decree should contain the words "without prejudice"

nores the arguments of Petitioner's Appellant's Brief in that Court.[8] That each of these several original defects in the Opinion works to the detriment of Petitioner's appeal clearly reveals the intent of that court. That court also denied Petitioner's Motion for Reconsideration (Order, page 71 hereinafter) addressed to the points first raised in the Opinion (respondent filed no brief and presented no oral arguments in that

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in order to reserve to the complainant the privilege of asserting his rights in a subsequent action.

[8]Opinion, page 65 hereinafter:
(vi) Petitioner <u>does</u> argue good cause. <u>Black's Law Dictionary, Sixth Edition</u> (1990) at page 692 defines good cause as "legally sufficient ground or reason." Petitioner argues accordingly, Appellant's Brief, pages 74-77 hereinafter; and
(vii) Petitioner's arguments <u>do</u> address the test for substantial justification. See Appellant's Brief, pages 77-79 hereinafter, and pages 21-24 hereinbefore.

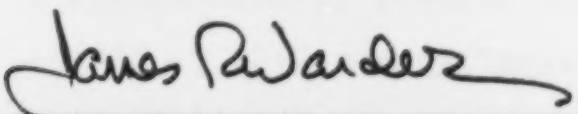
court).

Such purposeful deprivation of meaningful appellate review customarily afforded similarly situated Maryland litigants (see the Maryland cases cited hereinbefore and Lano v. State, 195 Md. 363, 77 A.2d 125 (1950) (motion for reargument on appeal granted)) renders appellate review in the instant case a sham, and demonstrates the discriminatory purpose of the Court of Special Appeals in affirming the award of Respondent's attorney's fees. "Discriminatory purpose" implies that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects. Wayte v. United States, supra, at 610, 1532.

Where it is clear that the action of the State violates the terms of the

fundamental charter, it is the obligation of this Court so to declare. Shelley v. Kraemer, supra, at 23, 847.

Respectfully submitted,



James R. Wardell, Petitioner
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IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

JAMES R. WARDELL Plaintiff/Counter-Defendant v. DIAMOND FARMS CONDOMINIUM ASSOCIATION, et al. Defendants/Counter-Plaintiff	Civil Action No. 75721

ORDER

Upon consideration of the Motion to Rescind Protective Order, the Opposition thereto and based on the entire record in this matter, it is this 11th day of December, 1992

ORDERED that the Motion be, and it hereby is, DENIED. And it is

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Note: Interlineation indicates page numbers in Appellant's Brief in the Court of Special Appeals (pages 73-85 hereinafter).

FURTHER ORDERED that Mr. James R. Wardell shall pay to Mark M. Tracy $450.00 representing Mr. Tracy's costs and expenses associated with opposing the Motion to Rescind Protective Order. That payment shall be made within ten (10) days of the date of this Order. And it is

FURTHER ORDERED that Mr. James R. Wardell shall not take any action whatsoever by way of seeking a deposition, affidavit or otherwise, to obtain testimony from Mark M. Tracy regarding any matter which Mr. Wardell contends is related to any claim raised by any party in this case, whether such claim has been dismissed or not.

[signed:
Paul A. McGuckian]

Judge, Montgomery
County Circuit Court

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IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

JAMES R. WARDELL,	
Plaintiff,	
v.	Civil No. 75721
DIAMOND FARMS CONDOMINIUM, WILLIAM P. MURPHY, CONDOMINIUM MANAGEMENT, INC.,	
Defendants.	

HEARING

Rockville, Maryland December 11, 1992

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Note: Interlineation indicates page numbers in Appellant's Brief in the Court of Special Appeals (pages 73-85 hereinafter).

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IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

JAMES R. WARDELL,	
Plaintiff,	
v.	Civil No. 75721
DIAMOND FARMS CONDOMINIUM, WILLIAM P. MURPHY, CONDOMINIUM MANAGEMENT, INC.,	
Defendants.	

Rockville, Maryland

December 11, 1992

WHEREUPON, proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE PAUL A. McGUCKIAN, Judge

APPEARANCES:

FOR THE PLAINTIFF:

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FOR MR. MARK TRACY:

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P R O C E E D I N G S

THE CLERK: Civil 75721; James R. Wardell versus Diamond Farms Condominium.

MR. WARDELL: Good morning, Your Honor. James Wardell.

MR. ZINKGRAF: Your Honor, Gary Zinkgraf for Mark Tracy.

THE COURT: What was your name again?

MR. ZINKGRAF: I'm sorry. Gary Zinkgraf.

THE COURT: All right. Mr. Wardell, it is your motion.

MR. WARDELL: Thank you, Your Honor. At the outset I have a proposed Order which I would like to submit at this time. There was a Motion for Protective Order. At that time, the matter of the expert witness fee was an issue. This

additional proposed Order addresses the issue of the expert witness fee.

Also at the outset, I would like to say that we are, of course, governed by the Equal Protection Clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The cases I cite this morning and have cited in my Motions are governing. We believe that I am entitled to the equal protection of the laws, as set forth in the cases cited.

We are here on two Motions this /296
morning, Your Honor. One is the Motion for Body Attachment and Fine of a putative deponent, and the second is a Motion to Rescind the Protective Order as to that deponent.

The Motion for Body Attachment and Fine was previously withdrawn. Then there was a hearing by Judge Weinstein,

and he in fact denied the Motion. But it had been withdrawn. We have reinstated the Motion. We believe that his prior ruling on this matter is nugatory.

Maryland Rule 2-411 provides that, "Any party to an action may cause the testimony of a person, whether or not a party, to be taken by deposition for the purpose of discovery or for use as evidence in the action or for both purposes." Accordingly, we seek to take the deposition of Mark M. Tracy in the matter of a letter of October 1, 1990, which we have submitted with our Motion, alleged to be from Mr. Tracy, which letter was first introduced in this matter by defendant, Diamond Farms Condominium Association, at the hearing of March 23, 1992, over plaintiff's objection, when Mr. Tracy was not

present at the hearing, which letter was the only substantial evidence supporting the decision then rendered.

The issue then addressed was whether or not a rule imposed by the condominium association is a valid exercise of the police power, and we believe it is not. Mr. Tracy's letter --

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THE COURT: Police power?

MR. WARDELL: Is a valid exercise of the police power.

THE COURT: Who is exercising the police power?

MR. WARDELL: The condominium association established a rule prohibiting a washer and dryer in the units.

THE COURT: What makes you think that is an exercise of the police power?

MR. WARDELL: Well, it's an exercise

of --

THE COURT: It is an exercise of their contractual rights, is it not?

MR. WARDELL: I suppose it might be that, too, yes.

THE COURT: Go ahead.

MR. WARDELL: More particularly, I might state what I stated in my Complaint. The Complaint alleges, "That the aforesaid Association's demand" to remove the washer and dryer "arbitrarily deprives Plaintiff of vested property rights without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States," and furthermore, "That the aforesaid Rule is entirely arbitrary and is not reasonably adapted to the public interest or to any of Defendant Diamond Farms' lawful interests."

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That, in fact, is the specific

issue which we address. We believe it is synonymous with the exercise of police power in terms of the interpretations of that statute.

Proceeding as to the Motion for Body Attachment and Fine, the Order which was entered subsequent to that hearing is an interlocutory order, and it is subject to revision at any time prior to the entry of final judgment. There has not yet been a final judgment in this matter.

Discovery in this matter is not required to be completed until 45 days prior to May 5, 1993, pursuant to the Trial Date Notice of January 9, 1992, and its relevant Order of May 7, 1992.

I served a Notice, a copy of which is attached to the Motion, of a Deposition Upon Oral Examination of Mr. Tracy, which was to have taken place at

9:00 a.m., on April 24, 1992, and Mr. Tracy failed to appear for that deposition. Mr. Tracy was in fact served with a Subpoena on April 7, 1992, requiring his appearance. I have submitted an Affidavit of the Court Reporter who was present at the time of the deposition which did not take place.

Accordingly, we are requesting pursuant to Section 9-201(b) of the Maryland Courts and Judicial Proceedings Article and Maryland Rule 2-510(h), that this Court forthwith issue a bench warrant for Mr. Tracy and that Mr. Tracy be fined. /299

Our authorities in this matter are several. We have already cited Maryland Rule 2-411, which is our right to take the deposition. The Court of Appeals has frequently stated that the discovery rules are to be liberally construed, and

we have cited cases to that effect.

The case of A.V. Laurins and Company, Incorporated, versus Prince George's County, cited in our Motion, states as follows: "The proper procedure for the Circuit Court's enforcement of the subpoena would have involved attachment and fine as described in Maryland Rule 2-510(h) and interpreted by the Court of Appeals in Evans versus Howard. Bench warrants could have been issued for the absent parties. See Hainsworth versus State."

In Hainsworth the bench warrants were in fact issued. In Evans versus Howard, the Court set forth that the sanction for the failure without sufficient excuse to obey a summons served under the Rule is that the witness shall be liable to attachment and fine.

As to the revisability of the order, or rather the interlocutory nature, the Court of Appeals has said that all judgments are subject to revision in multi-claim or multi-party suit until the claims of all the parties against each other have been disposed of, absent both an expressed determination that there is no just reason for delay and an express /300 direction for entry of judgment.

Also said by the Court of Special Appeals, an interlocutory judgment entered under this Rule is subject to revision at any time by any judge having jurisdiction over the matter.

We believe that the matter of the pending appeal is really not in any way controlling. However, although generally the trial court's jurisdiction may be ousted once an appeal has been

perfected, the trial court is not precluded from proceeding as to collateral or independent matters; only those postappeal orders which affect the subject matter of the appeal have been prohibited.

The case of McKown versus Criser's Sales and Service, which we have cited, sets forth as follows: "We note that after the appeal" from an appealable interlocutory order "was filed, the appellant filed and obtained an order from the Circuit Court for Baltimore County to permit the taking of Criser's employees' depositions in the State of Virginia on not less than 20 day's notice of the time and place."

We believe this case to be controlling as to the instant deposition. Mr. Tracy is similarly situated as the employees in Criser

were. He has provided a professional opinion upon which the defendant relied in a similar manner as which employees provide professional opinions upon which /301 their employers rely. We see no reason for discrimination favoring Mr. Tracy that would prohibit his deposition at this time.

That is it as to the Motion for Body Attachment and Fine. As to the Motion to Rescind the Protective Order, I really have very little to add except to state that the Protective Order was issued at a time when we had in fact noted the deposition and Mr. Tracy had failed to appear, and at which time we had obtained other evidence which we submitted in a Motion to Revise the judgment. The Motion to Revise was denied. So we are now seeking to take Mr. Tracy's deposition.

At that time we had indicated that we would not need to take his deposition at that time, but we would preserve the right to do so. Now it is necessary for us to take his deposition if we are to prevail in this matter.

So we are requesting that the Protective Order be rescinded. It was in fact entered without prejudice expressly, and we ask now that it be rescinded.

We also -- if I may, Your Honor, as to Mr. Zinkgraf's request for attorney's fees, without prejudice to what we have just said, we believe strongly that this matter is not without substantial justification and it is not within the gambit of Maryland Rule 1-341.

As our authority thereto, we would /302
quote from Century I Condominium Association, Incorporated, versus Plaza

Condominium Joint Venture, 64 Md.App. 107, 494 A.2d 713 (1985). Therein at 717, "As we pointed out in Blanton versus Equitable Bank, National Association, before Rule 1-341 sanctions may be applied, one or both of two predicates must exist. They are 'bad faith' and 'lack of substantial justification.' Ordinarily, a trial judge faced with a Rule 1-341 motion should make an explicit determination as to the existence of these factors. See Hess versus Chalmers."

Furthermore at 719, "In Dent versus Simmons, we reversed a 'without substantial justification' award of attorney's fees on the basis of abuse of discretion. We reasoned that 'a litigant ought not be penalized for innovation or exploration beyond existing legal horizons unless such

exploration is frivolous.' In Blanton we explained that an action is frivolous if 'it indisputably has no merit.'"

"As we observed in Hess, 'without substantial justification' should not be interpreted to mean that the winning party is entitled to counsel fees simply because his opponent misconceived the legal basis upon which he sought to prevail."

We believe -- well, it is obvious, Your Honor, that the statute intends that such depositions might take place. There are express provisions for
/303
remuneration of expert witness fees, and that has become an issue. While there may not be any cases expressly establishing the right as to an expert witness, we believe that there are sufficient controlling cases that we have that right.

This is certainly not without substantial justification, Your Honor. We need to take this man's deposition in light of the fact that a letter which purports to be from him was introduced in evidence.

Finally, Your Honor, I might request that, without prejudice once again, if Your Honor is inclined to award attorney's fees, that Your Honor delete the ten days to make payment for the award as Mr. Zinkgraf has requested.

The effect of imposing such a time for paying an award in circumstances such as this case would effectively force an appeal, and the courts have repeatedly stated that piecemeal appeals are not favored. We would prefer that the issue go to appeal after the final judgment in this matter.

THE COURT: All right. Thank you.

MR. ZINKGRAF: Your Honor, my client, Mr. Tracy, is not a party to this action. Mr. Wardell sought his deposition earlier. We moved for protective order, supplemented that protective order on the grounds that any testimony that Mr. Tracy might have, the issues had been dismissed. It is my understanding that may be on appeal, but Mr. Tracy has no relevant testimony to any issues before the Court. /304

In light of that, Judge Weinstein entered a Protective Order on August 3, ordering that Mr. Wardell is prohibited from obtaining a subpoena or noticing a deposition or using any other court process in an effort to obtain testimony from Mr. Tracy. He did grant it without prejudice, but it requires a showing of good cause on how the proposed testimony relates directly to an issue pending in

this action.

Mr. Wardell has put nothing in his briefs which is new, and I have not heard anything new today. We believe this is a frivolous motion.

THE COURT: What is Mr. Tracy's legal fees in this matter?

MR. ZINKGRAF: I would estimate them to be about $750.

THE COURT: For this hearing, this motion?

MR. ZINKGRAF: By the end of today, I would think. We can submit the exact fees, if you would like them.

THE COURT: Mr. Wardell --

MR. WARDELL: Yes, Your Honor.

THE COURT: -- you are going to learn one of these days that you cannot go ahead and maintain these kinds of frivolous actions in this court without paying a penalty. Bringing people in,

causing them great expense. Judge
/305
Weinstein was very clear that you had to show good cause. You have not shown any good cause here this morning. There was nothing in your pleading that showed good cause. You certainly have not argued anything this morning. So the Court is going to deny both of your motions. I believe they were frivolously filed with no justification. And the Court will order $450 attorney's fees against you in favor of Mr. Tracy.

Counsel, would you present an order to that effect?

MR. WARDELL: Your Honor, will you delete the ten days requirement as I requested?

THE COURT: No, I will not. The order has been entered.

MR. ZINKGRAF: Thank you, Your Honor.

MR. WARDELL: Thank you, Your Honor.

THE COURT: All right.

(Whereupon, the hearing was concluded.)

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C E R T I F I C A T E

CompuScribe hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

CIVIL NO. 75721

JAMES R. WARDELL

v.

DIAMOND FARMS CONDOMINIUM

By:

[signed]

Gail A. Williams, Transcriber

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IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

JAMES R. WARDELL, Plaintiff/Counter-Defendant v. DIAMOND FARMS CONDOMINIUM ASSOCIATION, et al. Defendants/Counter-Plaintiff	Civil Action No. 75721

ORDER

Upon consideration of the Opposition to Motion for Body Attachment and Fine, it is this 3rd day of August, 1992

ORDERED that the Motion for Body Attachment and Fine be, and it hereby is, DENIED. And it is

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Note: Interlineation indicates page numbers in Appellant's Brief in the Court of Special Appeals (pages 73-85 hereinafter).

FURTHER ORDERED that Mr. James R. Wardell is prohibited from obtaining any subpoena, noticing any deposition or using any other Court process in an effort to obtain testimony from Mark M. Tracy unless permitted by an Order of this Court after a showing of good cause how the proposed testimony relates directly to an issue pending in this action. without prejudice [sic]

[signed:
Paul H. Weinstein]

Judge, Montgomery
County Circuit Court

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 11

SEPTEMBER TERM, 1993

JAMES R. WARDELL

v.

MARK M. TRACY

Bishop,
Cathell,
Motz,

JJ.

Per Curiam

Filed: September 23, 1993

James R. Wardell, appellant, was ordered by the Circuit Court for Montgomery County to pay $450 in attorney's fees to Mark M. Tracy, appellee, pursuant to Maryland Rule 1-341, for filing a motion without substantial justification. Appellant posits three questions, which we rephrase as follows:

> 1. Did the lower court err in finding that the Motion to Rescind Protective Order and the Motion for Body Attachment and Fine were without substantial justification?
>
> 2. Was the award an abuse of discretion?
>
> 3. Does the award of attorney's fees violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

THE FACTS

The facts, pleadings, and motivations in this case are quite

involved. The issues on appeal are, however, quite narrow. We shall address only those facts relevant to the issues on appeal. Appellant has been skirmishing with the Diamond Farms Condominium Association and its Council of Unit Owners for several years. The association governs a condominium complex where appellant owns a unit. Appellant has appeared pro se in numerous proceedings before the Circuit Court for Montgomery County, and in at least one other appeal to this Court.

On April 7, 1992, Tracy was served with a subpoena by appellant to appear at a deposition. Tracy was not, and is not now, a party to the underlying suit. Appellant wished to depose him regarding a letter he wrote which was introduced into evidence by the Condominium Association at a hearing on appellant's

complaint. Tracy's counsel informed appellant that Tracy would not appear for the deposition.

Tracy filed a Motion for Protective Order on April 22, 1992, alleging that appellant sought expert testimony from Tracy, yet refused to pay any expert witness fee. Although informed that Tracy would not appear, and that a Motion for Protective Order was pending, appellant appeared for the deposition on April 24th and subsequently moved for a body attachment and fine against Tracy for failure to appear pursuant to a subpoena. On May 1, Tracy filed a supplement to his motion, alleging that those counts of appellant's complaint relating to his testimony were dismissed by the circuit court on March 26, 1992.

The trial court denied the Motion for Body Attachment and Fine on August

3, 1992, and entered a protective order prohibiting appellant "from obtaining any subpoena, noticing any deposition or using any other Court process in an effort to obtain testimony from Mark M. Tracy unless permitted by an Order of this Court after a showing of good cause how the proposed testimony relates directly to an issue pending in this action." The trial judge added that the order was "without prejudice."

On October 29, 1992, appellant filed a Reinstatement of Motion for Body Attachment and Fine and a Motion to Rescind Protective Order.

THE LAW

Maryland Rule 1-341 reads:

> In any civil action, if the court finds that the conduct of any party in maintaining or defending any proceeding was in bad faith or without substantial justification the court may

> require the offending party or the attorney advising the conduct or both of them to pay to the adverse party the costs of the proceeding and the reasonable expenses, including reasonable attorney's fees, incurred by the adverse party in opposing it.

The Court of Appeals has expressly adopted a standard of review for an award of attorney's fees under this rule.

> ... [B]efore imposing sanctions in the form of costs and/or attorney's fees under Rule 1-341, the judge must make two separate findings that are subject to scrutiny under two related standards of appellate review. First, the judge must find that the proceeding was maintained or defended in bad faith and/or without substantial justification. This finding will be affirmed unless it is clearly erroneous or involves an erroneous application of law. Second, the judge must find that the bad faith and/or lack of substantial justification merits the assessment of costs and/or attorney's fees. This finding will be affirmed unless it was an abuse of discretion.

Inlet Associates v. Harrison Inn Inlet,

Inc., 324 Md. 254, 267-68 (1991). See also Deleon Enterprises, Inc. v. Zaino, 92 Md.App. 399, 415 (1992); Art Form Interiors, Inc. v. Columbia Homes, 92 Md.App. 587, 593-94, cert. denied, 328 Md. 567 (1992).

The trial judge must make explicit findings of fact that a proceeding was maintained or defended in bad faith and/or without substantial justification. Inlet Associates, 324 Md. at 269 (citing Zdravkovich v. Bell Atlantic-Tricon Leasing Corp., 323 Md. 200, 210 (1991)). See also Talley v. Talley, 317 Md. 428, 436 (1989); Beery v. Maryland Medical Laboratory, Inc., 89 Md.App. 81, 98 (1991), cert. denied, 325 Md. 329 (1992); Legal Aid Bureau, Inc. v. Bishop's Garth, 75 Md.App. 214, 220, cert. denied, 313 Md. 611 (1988); Century I Condominium Assoc., Inc. v.

Plaza Condominium Joint Venture, 64 Md.App. 107, 115 (1985).

Awarding attorney's fees under this rule is an extrordinary remedy, and it should be used sparingly. Inlet Associates, 324 Md. at 277, n.4 (Bell, J. dissenting); Talley, 317 Md. at 438 (rule is extraordinary remedy and should reach only intentional misconduct); Art Form Interiors, Inc., 92 Md.App. at 598 ("sanctions should be reserved 'for the deterrence of unnecessary or abusive litigation.'"); Black v. Fox Hills N. Community Ass'n, Inc., 90 Md.App. 75, 84, cert. denied, 326 Md. 177 (1992) (rule should be invoked only for clear, serious abuses of judicial discretion). See also Kelley v. Dowell, 81 Md.App. 338, cert. denied, 319 Md. 303 (1990). "Rule 1-341 sanctions are judicially guided missiles pointed at those who

proceed in the courts without any colorable right to do so." Bishop's Garth, 75 Md.App. at 224.

1.

Appellant contends that the trial court erred in finding that his motions were without substantial justification. He argues that Maryland Rule 2-411 gives him the right to depose Tracy. Rule 2-411 does not grant parties the right to depose non-parties at will. Depositions can only be taken to obtain discovery or evidence. These are narrow purposes and the circuit court had previously found that appellant's deposition of Tracy was not proper for discovery or evidentiary purposes. Under the protective order, appellant needed a new showing of good cause to depose Tracy. He showed none.

Appellant does not argue that he complied with the protective order by showing good cause for its rescission. Instead, he argues that, because he could not find any identical fact pattern in a Maryland case, his motion is arguably an extension of existing law; that the testimony would relate to the issue of a constitutionally protected property right; and that appellee did not cite any authority for its assertion that the motion was frivolous. These arguments, however, do not address the test for substantial justification.

According to the Court of Appeals, substantial justification is "a reasonable basis for believing that a case will generate a factual issue for the fact-finder at trial[,]" or a position that is "'fairly debatable' and

'within the relm of legitimate advocacy.'" Inlet Associates, 324 Md. at 268 (citing Newman v. Reilly, 314 Md. 364, 380-81 (1988), and Needle v. White, Mindel, Clarke and Hill, 81 Md.App. 463, 476, cert. denied, 319 Md. 582 (1990)). The Court also looked to the comment in the Maryland Lawyers' Rules of Professional Conduct, Rule 3.1, where an action would be without substantial justification if "the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for extension, modification or reversal of existing law." Id. at 268. We note that a citation to the Lawyers' Rules of Conduct does not necessarily mean that the standard applies to lawyers only. Rule 1-341 applies to all parties, and the Court's reference only

borrows the language, not the application.

After a hearing, in which all parties were given ample opportunity to present their arguments, the trial court addressed appellant and found that, while the protective order was granted without prejudice,

> Judge Weinstein was very clear that you had to show good cause [to attempt to obtain Tracy's testimony]. You have not shown any good cause here this morning. There was nothing in your pleading that showed good cause. You certainly have not argued anything this morning. So the Court is going to deny both of your motions. I believe they were frivolously filed with no justification.

Based on a review of the record, the trial judge was not clearly erroneous. We find no error.

2.

In awarding fees, the court may

exercise its discretion in the light of certain factors including: evidence submitted by counsel showing time spent defending an unjustified or bad faith claim or defense, the judge's knowledge of the case and the legal expertise required, the attorney's expertise and reputation, customary fees, and affidavits submitted by counsel. Deleon, 92 Md.App. at 419-20. See also Jenkins v. Cameron & Hornbostel, 91 Md.App. 316, 337, cert. denied, 327 Md. 218 (1992); Johnson v. Baker, 84 Md.App. 521, 543 (1990), cert. denied, 322 Md. 131 (1991); Century I Condominium Assoc., Inc., 64 Md.App. at 121. But cf. Beery, 89 Md.App. at 102 (party seeking attorneys' fees must establish expenses actually incurred, especially where not all counts in a pleading are substantially unjustified or in bad

faith).

Appellant does not dispute the amount of attorney's fees awarded. The totality of appellant's argument is that, because the court's finding that the motions were unjustified was clearly erroneous, the award of attorney's fees is an abuse of discretion. Because we hold that the trial court's decision was not clearly erroneous, appellant's argument fails. We hold that the trial court did not abuse its discretion, and that the award of $450 in attorney's fees was not error.

3.

Appellant's Equal Protection claim is utterly and completely without merit. He presents us with no law or facts to support his contention that awarding attorney's fees denies him equal

protection of the law. We address the issue only because it is a clear example of the type of unjustified proceeding that Rule 1-341 was meant to address. Had any party spent time or money defending that claim, we would have, upon proper motion, awarded attorney's fees.

For the foregoing reasons, the trial court's judgment awarding attorney's fees under Maryland Rule 1-341 is affirmed.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.

Denied by
panel
AM Wilner
[signed]
11/3/93

IN THE COURT OF SPECIAL
APPEALS OF MARYLAND

JAMES R. WARDELL,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 11
	)	September Term, 1993
MARK M. TRACY,	)	
	)	
Appellee.	)	

MOTION FOR RECONSIDERATION

Appellant, James R. Wardell, respectfully represents unto Your Honors, Appellant's Motion for Reconsideration of the decision rendered herein:

I. THE COURT OF SPECIAL APPEALS SHOULD GRANT RECONSIDERATION.

The Court of Special Appeals affirmed the award of attorney's fees in

JAMES R. WARDELL *In the

*Court of Appeals

*of Maryland

v.

*Petition Docket No. 531

*September Term, 1993

MARK M. TRACY *(No. 11, Sept. Term 1993, Court of Special Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: January 26, 1994

IN THE COURT OF SPECIAL
APPEALS OF MARYLAND

JAMES R. WARDELL,	)	
	)	
Appellant,	)	
	)	
v.	)	No. 11
	)	September Term, 1993
MARK M. TRACY,	)	
	)	
Appellee.	)	

APPELLANT'S BRIEF

APPEAL FROM THE CIRCUIT COURT
FOR MONTGOMERY COUNTY

(Paul A. McGuckian, Judge)

James R. Wardell, Appellant
870 Quince Orchard Blvd., #202
Gaithersburg, MD 20878
(301) 963-8279

Notes: Interlineation indicates page numbers therein. E indicates reference to the Printed Extract.

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V. Argument

Question No. 1: Whether the lower court erred in finding that the Motion to Rescind Protective Order was without substantial justification.

Maryland Rule 2-411 provides that, "Any party to an action may cause the testimony of a person, whether or not a party, to be taken by deposition for the purpose of discovery or for use as evidence in the action or for both purposes."

In the instant case, Appellant seeks to take Appellee's deposition in the matter of a letter (E) of October 1, 1990 alleged to be from Appellee. The letter was first introduced in this matter by Defendant Diamond Farms Condominium Association at the Hearing of March 23, 1992 (E), over Appellant's objection (E), when the Appellee was not present

at the Hearing. The letter addresses the matter of (clothes) washing machines at Diamond Farms, and was the only /10 substantial evidence supporting the decision then rendered (E). The issue was whether Appellant has a constitutionaly protected vested right to have a clothes washer and a clothes dryer in his Unit (See, Counts One and Two of the Complaint, E). The Order of March 26, 1992 (E), by its own terms, is an interlocutory order subject to revision at any time before the entry of final judgment, pursuant to Maryland Rule 2-602(a)(3).

Appellee failed to appear for his deposition on April 24, 1992 (E).

Appellee's Motion for Protective Order was granted <u>without prejudice</u> af- a Hearing on August 3, 1992. The circumstances are clear from the record (E):

MR. WARDELL: . . . .

Now, Your Honor, if I may go on. We originally filed a motion for body attachment of Mr. Tracy, and we have withdrawn that motion because we have obtained other evidence.

However, we may wish to take Mr. Tracy's testimony, his deposition, later in this action. We see no reason to file a protective order. I have no intention of taking his deposition at the present time, but I may --

THE COURT: All right. I am going to grant the protective order without prejudice. If you can show a basis for taking Mr. Tracy's deposition down the road, I will leave that open to you.

The Motion to Revise was denied (E). Appellant then moved to rescind the protective order (E). The Court on December 11, 1992 (See, E pp. 292 ff.) found that Appellant had not shown good cause to rescind the protective order and awarded Appellee's attorney's fees (E p. 307).

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The grounds for rescinding the protective order are the same as the orig-

inal grounds for the deposition, supra. Appellant seeks to take Appellee's deposition as to the letter entered in evidence, and may then again move to revise the Order of March 26, 1992.

The instant case is similar to McKown v. Criser's Sales and Service, 48 Md.App. 739, 430 A.2d 91 (1981), cert. denied, where this Court observed at 751, 99:

> We note that after the appeal was filed, the appellant filed and obtained an order from the Circuit Court for Baltimore County, to permit the taking of Criser's employees' depositions in the State of Virginia on not less than twenty days' notice of the time and place.

See also, Coe v. Bass, 74 Md.App. 346, 537 A.2d 643 (1988), where nonparty attorneys and a State Trooper who had worked for the opposing party were deposed.

Century I Condominium Association,

Inc. v. Plaza Condominium Joint Venture, 64 Md.App. 107, 119, 494 A.2d 713, 719 (1985):

> In Dent v. Simmons, 61 Md.App. 122, 485 A.2d 270 (1985), we reversed a "without substantial justification" award of attorney's fees on the basis of abuse of discretion. We reasoned that "[a] litigant ought not be penalized for innovation or exploration beyond existing legal horizons unless such exploration is frivolous." 61 Md.App. at 128, 485 A.2d 270. In Blanton {infra}, we explained that an action is frivolous /12 if "it indisputably [has] no merit...." 61 Md.App. at 166, 485 A.2d 694 (quoting In Re Marriage of Flaherty, 31 Cal.3d 637, 183 Cal.Rptr. 508, 646 P.2d 179, 187 (Cal.App. 1982). {Brackets supplied; braces added}

Although Appellant's effort to take the deposition of an expert witness in the circumstances of the instant case might remotely be considered "exploration beyond existing legal horizons" for lack of an identical authority in Maryland case law, it is not frivolous. The

letter in evidence alleged to be from Appellee is relevant to the pending issue of Appellant's vested right. Neither did Appellee present any authority suggesting that such an effort is frivolous. Appellant's effort is certainly not one that indisputably has no merit.

The Motion to Rescind is clearly not without substantial justification, accordingly.

Question No. 2: Whether the award of attorney's fees is an abuse of discretion, accordingly.

Century I Condominium Ass'n, Inc. v. Plaza Condominium Joint Venture, supra at 115, 717:

> As we pointed out in Blanton v. Equitable Bank, National Association, 61 Md.App. 158, 161, 485 A.2d 694 (1985), before Rule 1-341 sanctions may be applied, one or both of two predicates must exist. They are "bad faith" and "lack of substantial justification."

The finding of the lower court (E

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p. 305, l. 6) that the Motion to Rescind was "frivolously filed with no justification" is clearly erroneous, supra Question No. 1. The award of attorney's fees is an abuse of discretion accordingly and should be reversed. See also, Dent v. Simmons, supra.

Question No. 3: Whether the award of attorney's fees is violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Section 1 of the Fourteenth Amendment to the Constitution of the United States requires, in part, as follows:

> . . . nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws.

State of Missouri v. Lewis, 101 U.S. 22, 30, 25 L.Ed. 989 (1879):

> [T]he general objects and purposes of the [Equal Protection Clause of the] Fourteenth Amend-

ment . . . are . . . to prohibit the States . . . from denying to any person within their jurisdiction the equal protection of the laws. It contemplates persons and classes of persons . . . within the places or municipalities for which such [laws] are made . . . , in like cases and under like circumstances.

Shelley v. Kraemer, 334 U.S. 1, 14, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948):

> That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition /14 which has long been established by decisions of this Court.

And, Washabaugh v. Washabaugh, 285 Md. 393, 404, 404 A.2d 1027, 1033 (1979), the test for constitutionality under the Equal Protection Clause is

> whether it complies with the so-called "rational basis test," as "bear[ing] a rational relation to or rest[ing] upon some ground of difference having a fair and substantial relation to a legitimate state objective." {brackets supplied}

The instant case is like the cases cited herein and in the lower court. The lower court is without any rational basis for the discriminatory award of attorney's fees, accordingly.

The award of attorney's fees is a violation of the Equal Protection Clause of the Fourteenth Amendment, accordingly, and should be reversed.

Order of August 3, 1992, page 246 of Appellant's Brief, is to be found at page 54 herein.

Hearing of December 11, 1992, pages 292-306 of Appellant's Brief, is to be found at page 31 herein.

Order of December 11, 1992, page 307 of Appellant's Brief, is to be found at page 29 herein.